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No. 93-1448

In The

Supreme Court of The United States

October Term, 1993

EVER MIGUEL LEGARDA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under Application Note 12 of § 2D1.1 of the Sentencing Guidelines of the United States Sentencing Commission, a general assent to engage in further drug transactions without specific agreement as to price, quantity or other particulars, is sufficient to warrant an increase in the Base Offense Level on the basis of the additional "negotiated" amount.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner, Ever Miguel Legarda petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit which affirmed the judgment of conviction entered against him in the United States District Court for the District of Rhode Island. Petitioner was convicted after a jury trial of possession with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(ii), and was sentenced to a term of imprisonment of 235 months under the

provisions of the United States Sentencing Guidelines ("USSG")

OPINIONS BELOW

The judgment of the Court of Appeals was issued on March 3, 1994, and is reproduced in the Appendix to this Petition at 1a. The Court of Appeals' opinion, issued on March 3, 1994 is reproduced in the Appendix at 2a, and is reported in ___ F.3rd ___.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Application Note 12 under § 2D1.1 of the Sentencing Guidelines of the United Stated Sentencing Commission, provides,

> In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude

from the guideline calculation the amount that it finds the defendant did not produce and was not reasonably capable of producing.

STATEMENT OF THE CASE

On August 20, 1992, in Providence, Rhode Island, Drug Enforcement Administration ("DEA") Agent Lawrence Lepore, acting in an undercover role, met with Petitioner and one Michael Texeira, the latter a Government informant, to consummate the purchase of twenty kilograms of cocaine. Lepore had not had any prior meetings nor discussions with Petitioner, the deal having been arranged by Texeira. (Tr. 10-11; 49-50)[1]

After a brief introductory conversation, Lepore and Texeira drove to an apartment in Warwick that had been set up by the agent for undercover purposes. Legarda followed in his vehicle. Lepore and Texeira entered the apartment first followed a few minutes later by Legarda and his two children, who apparently had accompanied him on a trip from New York (Tr. 12-14). Lepore was expecting to purchase twenty kilos of cocaine but Legarda explained that he only brought eleven because that was all "his people" in New York had given him. The agent also complained about the price per kilo Legarda was asking, and after some further discussion Legarda agreed to reduce it (Tr. 17-18).

During the discussions there was some mention about

---

[1] Parenthetical references preceded by "Tr." are to the pages of the trial transcript; those preceded by "S" are to the pages of the sentencing transcript.

future deals. The entirety of the evidence on that issue came during the direct testimony of Agent Lepore, as follows:

> Q. Did you have any further conversation with him [petitioner] at that time concerning the price of cocaine?
>
> A. I did.
>
> Q. What was that?
>
> [Objection overruled]
>
> A. That I told him from this point on if we continue to do more business, that twenty-seven thousand would not be acceptable and he would have to come up with a better price than that.
>
> Q. Did anyone suggest a price?
>
> A. I suggested a price.
>
> Q. What price did you suggest?
>
> A. The price was that if he could provide 10 kilograms on a weekly basis to me, a price of twenty-five thousand per kilogram, that we would be able to do business.
>
> Q. What did the defendant tell you about future deals in cocaine?
>
> [Objection overruled]
>
> A. That he would have no problem supplying

that amount at that price.

Tr. 19-20 (emphasis added.)

Following those discussions, the three men went to the parking lot where Legarda retrieved a white carton sealed with tape from the trunk of his car. Returning to the apartment, they went into the bedroom where Lepore tore open the carton with a knife and removed one of eleven packages. After examining the package Lepore expressed his satisfaction and made a telephone call to arrange for the delivery of the money. The call was a pre-arranged signal to back-up agents to enter the apartment and place petitioner under arrest. Shortly after, the arrest was made and the eleven kilograms of cocaine were seized. (Tr. 22-33; 104-105)

During the entirety of the episode just described the informant, Texeira, was equipped with a Kel-set transmitter, which allowed back-up agents to monitor and record the conversations among the three men. (Tr. 42-47) The various conversations, some of which were in Spanish between Legarda and Texeira, were in fact recorded and transcripts made. (Tr. 54; 64) According to Agent Lepore, the tape was of poor quality and only limited portions of the conversations were decipherable. Lepore also had difficulty identifying the speakers. (Tr. 255-257)

The Pre-Sentence Report ("PSR") calculated petitioner's base offense level at "34", based on the assertion that 21 kilograms of cocaine were involved in the offense. (App. 91) Although the quantity of cocaine actually possessed and delivered by petitioner was eleven kilos, the PSR suggested that since there had been "negotiations" for future transactions between petitioner and the undercover agent, the additional quantity should be factored in the

computation under 2D1.1 of the Guidelines. Over defense objection, the district court accepted the PSR's analysis. (S-36)[2]

The court thus determined that petitioner's net offense level was "38" with a range of 235-293 months of imprisonment and imposed the sentence at the lowest end of that range. S-46.

---

2 The sentencing court also upwardly adjusted the base offense level by two points for "obstruction of justice", finding the defendant had lied in his trial testimony. (App. 139). In addition, the court departed upward by two levels because it found petitioner to be "very close to the top of this organization" and because petitioner used his children "as shields to carry out this crime." App. at S-39; 46.

REASONS WHY THE WRIT SHOULD BE GRANTED

UNDER APPLICATION NOTE 12 OF §2D1.1 OF THE SENTENCING GUIDELINES OF THE UNITED STATE SENTENCING COMMISSION, A GENERAL ASSENT TO ENGAGE IN FURTHER DRUG TRANSACTIONS WITHOUT SPECIFIC AGREEMENT AS TO PRICE, QUANTITY OR OTHER PARTICULARS, IS INSUFFICIENT TO WARRANT AN INCREASE IN THE BASE OFFENSE LEVEL ON THE BASIS OF THE ADDITIONAL "NEGOTIATED" AMOUNT.

Petitioner was charged with and convicted of possessing eleven kilograms of cocaine. Under the Drug Quantity Table of §2D1.1 of the Sentencing Guidelines, the resulting base offense level for that quantity of cocaine was level 32 with a sentencing range of 121-151 months of imprisonment. However, the district court concluded that 34 was the appropriate offense level,

> "because of the fact that some 22 pounds of cocaine were delivered and that there was a promise of 10 kilos of cocaine a week into the indefinite future. I'm satisfied that information is accurate, that was the deal that was negotiated, and that under those circumstances at least, there are 21 kilos of cocaine involved in this matter." S-36.

The sum and substance of the discussions between petitioner and the undercover agent about future transactions was the brief testimony of Agent Lepore, quoted verbatim above. It is readily apparent that the agent was the one who raised the issue and did most of the talking. Yet, in spite of its brevity and inconclusiveness, this one-sided colloquy

earned petitioner a three-year increase in the otherwise applicable sentence.

Application Note 12 under §2D1.1 states that the "weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount". However, "an off-hand statement referring to larger quantities of narcotics that amounts to no more that braggadocio is insufficient to establish that those quantities were 'under negotiation' as envisioned in Guidelines §2D1.4(a)" [3] United States v. Ruiz, 932 f.2D 1174, 1184 (7th Cir. 1991).

In Ruiz, as in this case, the defendant delivered less than had been promised to the undercover agent, upsetting the agent and prompting him to inquire whether he would get the rest. In response, the defendant stated "It doesn't matter. I'll get you the other kilo. And, if you want, even ten more I can get." As in this case, the sentencing court found that "based upon his capability of producing the drugs he did produce, I believe he was reasonably capable of producing the ten kilograms he said he could produce." Ibid, at 1184. The Seventh Circuit rejected that conclusion, opining

> And how much, really, can be made of Ruiz's comment? "
> Even ten more I can get" is hardly the negotiation of a specific drug transaction. If so, then had Ruiz said "I can get you tons more," or even "I can get you all the cocaine in Colombia," he could have been held

---

[3] In a 1992 amendment of the guidelines, § 2D1.4 was deleted in its entirety and the application note under discussion, formerly under that section, was appended to §2D1.1, effective November 1, 1992.

accountable for those amounts--a result that could not have been intended by Guidelines §§ 1B1.3 and 2D1.4.

Similarly, in United States v. Foley, 906 F.2d 1261 (8th Cir. 1990) the Court found clearly erroneous and reversed a BOL calculation based on the "negotiated" amount where it was the undercover agent who first raised the issue of future sales and in so doing "simply inquired about the cost" of an additional two ounces of cocaine. The Court's concluding observations are particularly applicable here:

> The agent might just have easily asked what the price of a kilogram would be in an effort to have such amount later be factored into the BOL.
>
> We have grave concerns that, in a case such as this, where the government conducts an undercover operation and (during the sale after which it knows an arrest will be made) makes a suggestion to the defendant about future sales, an intolerable avenue for abuse will be opened. While a defendant may be sentenced on the basis of uncharged conduct, that conduct must be his own (or where applicable that of a co-conspirator), not the government's conduct. We should not countenance allowing the government to manufacture conduct or negotiation without some evidence of knowing participation by the defendant in that conduct or negotiation.
>
> This record reveals that Foley's response to the agent's question about the cost of two

> ounces of cocaine did not amount to negotiation for a sale of that amount.

906 F.2d at 1265.

The scenario in this case is no less disturbing. As in Foley, the issue of future deals was raised by the agent, and his doing so was clearly an attempt to restore the case to the level he initially expected it to be, a twenty-kilo transaction, an unfulfilled expectation due to the defendant's inability to obtain that amount.

> Q. What explanation did the Defendant give about the discrepancy between the 11 kilograms actually for sale and the 20 that was proposed for sale?
>
> A. The Defendant told me that his people in New York were not giving him 20 kilograms and the most he could get was the 11. (Tr.17.)

Moreover, the agent did not actually request any additional quantity but simply set the price he would be willing to pay in future transaction, if any. The discussion, therefore, was no different than that in Foley. After all, if the dialogue was an actual negotiation or agreement for weekly deliveries of 10 kilograms "into the indefinite future", why stop the BOL calculation at only one additional delivery? The fact is the discussion was wholly speculative, hypothetical and inconclusive, and there is no more reason to factor ten additional kilograms than there is to factor twenty or thirty or forty.

Characterizing the issue as "close" (App. at A-9), the Court of Appeals nevertheless affirmed. It did so

notwithstanding that

> "Audible portions of the tape [recorded conversations] reveal vague comments, made exclusively by Lepore rather than by defendant, about the possibility of future deals. Thus, the tape itself does not reveal the existence of an agreement to provide additional drugs.

(App. at A-9) (emphasis added.)

Instead, the Court relied on the brief testimony by Lepore as the evidence supporting the district court's conclusion that petitioner had "agreed" to provide ten kilograms on a weekly basis. App. at A-10. But, as already discussed, petitioner's mere assent to the agent's general overtures was hardly an agreement to deliver ten kilograms of cocaine the following week! See cases cited in footnote "1" of the Court of Appeals' decision (App. at A-9-10).

Petitioner submits that, as predicted in United States v. Foley, supra, "an intolerable avenue of abuse" has, in fact, been opened, as demonstrated by the results of this case. This Court, in the exercise of its supervisory powers, should grant the writ and establish a rational and predictable standard in this important area of federal law.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE WRIT OF CERTIORARI SHOULD BE GRANTED.

June 1, 1994

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1448

UNITED STATES,
Appellee,

v.

EVER MIGUEL LEGARDA
Defendant, Appellant.

JUDGMENT

Entered: March 3, 1994

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.
By s/ JANICE M. O'NEIL
Chief Deputy Clerk.

[cc: Mr. Porco and Ms. Curran]

United States Court of Appeals
For the First Circuit

No. 93-1448

UNITED STATES,

Appellee,

v.

EVER MIGUEL LEGARDA,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. Francis J. Boyle, Senior U.S. District Judge]

Before

Torruella, Circuit Judge,
Coffin, Senior Circuit Judge,
and Stahl, Circuit Judge.

Dominick J. Porco with whom Martin L. Schmukler was on the brief for appellant.

Margaret E. Curran, Assistant United States Attorney, with whom Edwin J. Gale, United States Attorney, and Gerard B. Sullivan, Assistant United States Attorney, were on brief for appellee.

March 3, 1994

STAHL, Circuit Judge. In this drug appeal, defendant Ever Miguel Legarda challenges: 1) trial rulings made by the district court which excluded certain testimony on hearsay grounds; 2) the court's computation of the relevant amount of cocaine for sentencing purposes; and 3) the court's upward departure from the Guidelines. Finding no reversible error, we affirm.

I.
FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

In July of 1992, defendant traveled from New York City, where he resided, to his native country of Colombia. Upon his return to New York, and apparently at the urging of someone he had met in Colombia, defendant contacted Michael Teixera, known to defendant as Luis Rodrigues, and arranged a meeting on a Manhattan street corner. In a subsequent phone call by defendant to Teixera, the two arranged for Teixera to leave an automobile for defendant's use on that same Manhattan street corner where the two had

initially met. Defendant also agreed with Teixera that defendant would drive the car to a restaurant in Astoria, Queens, where he was to meet a man named Nunyo, that we would thereafter drive the car to Providence, Rhode Island, and that he would be paid several thousand dollars for doing so.

On August 20, 1992, adhering to the plan, defendant picked up the car in Manhattan, drove to the restaurant in Queens, and met Nunyo, who placed a box in the trunk of the car. The box contained eleven kilograms of cocaine, later found to be 88% pure. Rather than proceed directly to Providence, defendant drove to the home of his former girlfriend and his two sons where he obtained his former girlfriend's permission to travel to Providence in her car, rather than in the car he had picked up in Manhattan. Defendant drove to Providence accompanied by his two sons, both under the age of thirteen, and one dog.

Upon arriving in Providence, defendant again met Teixera, who was a government informant. Teixera had arranged for a controlled drug purchase in which defendant would sell cocaine to United States Drug Enforcement Administration ("DEA") Task Force Agent Lawrence Lepore, a detective in the Providence Police Department. Defendant followed Teixera to an apartment where Lepore was to make the purchase. Defendant's two sons entered the apartment, along with defendant. After discussing the price of the eleven kilograms with Lepore, as well as possible future sales, defendant delivered the eleven kilograms to Lepore. During the consummation of the deal, defendant's two sons were left in a separate room in the apartment. DEA agents observed the purchase and arrested defendant.

After his arrest, defendant stated to Lepore that he had brought his children along in order to lessen the likelihood of being stopped on his drive from New York City

to Providence. He also stated that he knew that the box contained drugs and that he was aware of larger quantities of drugs being imported from Colombia. He was nonetheless found guilty of possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(A)(ii).

II.

DISCUSSION

As noted above, defendant offers three challenges on appeal. We address them in turn.

A. The District Court's Hearsay Rulings

At trial, defendant took the stand and attempted to recount statements that were allegedly made to him by individuals in Colombia, as well as statements made by Nunyo, his contact in Astoria, Queens, and by Teixera. In each case, the district court sustained government objections on hearsay grounds. See Fed. R. Evid. 802. Defense counsel repeatedly explained that defendant was not offering these statements in order to prove the truth of the matter asserted. Rather, he argued that the significance of these alleged statements lay solely in the fact that they were made and that they therefore had an effect on defendant's behavior. See, e.g., Fed. R. Evid. 801(c) advisory committee's note ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted. and the statement is not hearsay."); United States v. Hicks, 848 F.2d 1, 3 (1st Cir. 1988) (quoting same).

On appeal, the government concedes that these hearsay rulings were erroneous, and we agree that the record clearly demonstrates error on the part of the trial court.

Nonetheless, not all improper exclusions of evidence require reversal. Rather, an appellant must show that an error "results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" United States v. Lane, 474 U.S. 438, 449 (1985) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). See also 28 U.S.C. § 2111 ("On the hearing of any appeal...in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do no affect the substantial rights of the parties."); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Defendant fails to establish such harm.

Judging from the contexts of the district court's multiple erroneous hearsay rulings, it appears that defendant in each instance was prepared to offer exculpatory information about each of the conversations, i.e., innocuous reasons offered to him by each speaker which would prompt defendant to perform the acts which eventually led to his arrest. Later in his testimony, however, defendant was allowed to offer this exculpatory explanation of events. Defendant testified that in his conversations with Teixera, Nunyo and others, he was led to believe that the delivery concerned either "spare parts" or cash. Thus, despite the erroneous rulings, defendant was eventually allowed to recount the essential elements of his own version of events. Notwithstanding his general complaints of unfairness, defendant does not argue, nor could he on the record before us, that these errors had a substantial and injurious effect or influence on the jury's decision to convict him.

In sum, defendant "was allowed to put on a defense, even if not quite so complete a defense as he might reasonably have desired." United States v. Hanson, 994 F,2d 403, 407 (7th Cir. 1993). The substance of the

excluded portions of his testimony was eventually allowed into evidence. Given these errors and no more, we cannot say that reversal is warranted.

B. Sentencing

1. The Amount of Cocaine and the District Court's Base

Offense Level Determination

The sentencing court determined defendant's base offense level on the basis of twenty-one kilograms of cocaine; eleven kilograms that were actually delivered, and ten more that defendant purportedly promised to deliver the following week. Defendant challenges the district court's inclusion of the latter amount.

We begin by noting that facts supporting a sentence, such as drug quantity determinations, must be proven by the government by a preponderance of the evidence. See United States v. Marino, 936 F.2d 23, 27 (1st Cir. 1991). Factual findings on such issues are reviewed only for clear error. Id.

Commentary Note 12 to section 2D1.1 of the United States Sentencing Guidelines provides in relevant part:

> In an offense involving negotiation to traffic in a controlled substance,
> the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount,

> the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

Our case law has followed the language of this Commentary Note in a rather faithful fashion, requiring a showing of both intent and ability to deliver in order to allow the inclusion of negotiated amounts to be delivered at a future time. See, e.g., United States v. Rotolo, 950 F.2d 70, 72 (1st Cir. 1991); United States v. Moreno, 947 F.2d 7, 9 (1st Cir. 1991), United States v. Estrada-Molina, 931 F.2d 964, 966 (1st Cir. 1991); United States v. Bradley, 917 F.2d 601, 604 (1st Cir. 1991). In this case, defendant challenges the district court's findings that he had both the intent and the ability to produce ten additional kilograms of cocaine. Though the case is close, we affirm.

At trial, a tape recording of the drug transaction in Lepore's apartment was placed in evidence. The taped conversation spans the period of time during which defendant purportedly negotiated to deliver the additional ten kilograms. Audible portions of the tape reveal vague comments, made exclusively by Lepore rather than by defendant, about the possibility of future deals. Thus, the tape itself does not reveal the existence of an agreement to provide additional drugs.[1]

---

[1] Compare, e.g., United States v. Cedano-Rojas, 999 F.2d 1175, 1179 (7th Cir. 1993) (finding that defendant had negotiated purchase of nine additional kilograms of cocaine where he stated, "'Save them, save them,' and instructed [government informant who was selling the drugs] 'Don't give them away.'"); United States v. Williams, 994 F.2d 1287, 1293 (8th Cir. 1993) (finding that defendant had

negotiated additional sale where, "[o]nce the [government] agent asked about the price of a quarter-pound [of cocaine], [defendant] did offer to try to obtain and sell him this amount"); United States v. Mahoney, 972 F.2d 139, 143 (7th Cir. 1992) (finding that defendant had negotiated additional sale where defendant discussed options for delivery and payment, and stated that he was "positive" that his supplier could deliver the additional amount); United States v. Cea, 963 F.2d 1027, 1031 (7th Cir.) (finding that defendant had negotiated additional purchase where evidence of "very specific negotiations as to price and amount" showed that defendant was "dead serious about buying and distributing ten kilograms of cocaine"), cert. denied, 113 S. Ct. 281 (1992); United States v. Burrell, 963 F.2d 976, 995 (7th Cir.) (finding that defendant had negotiated additional purchase where "the terms of the sale were negotiated and agreed upon"), cert. denied, 113 S. Ct. 357 (1992); Rotolo, 950 F.2d at 72 (finding that defendant had negotiated additional purchase where he, inter alia, "spoke specifically about taking delivery of an additional half ton") (emphasis in original); Moreno, 947 F.2d at 9 (finding that defendant had negotiated additional sale where he told government agents that he could supply five to ten kilograms at fifteen-day intervals and where defendant "agreed to supply these amounts, with the first delivery to be made within a week") (emphasis in original) with United States v. Reyes, 979 F.2d 1406, 1410)10th Cir. 1992) (finding that defendant had not negotiated additional sale because, "[w]hile Defendant did not rule out the possibility [of future drug transactions], the lack of specific details concerning an additional transaction indicates that, at best, Defendant intended to negotiate later"); United States v. Ruiz, 932 F.2d 1174, 1184 (7th Cir.) (finding that defendant had not negotiated additional sale where defendant, having promised two kilograms and

In addition to the tape, however, Lepore testified at trial that during the same meeting at which the delivery took place, defendant had agreed to provide ten kilograms on a weekly basis. Moreover, the inaudible portions of the tape do not altogether rule out the possibility that the specific agreement described by Lepore was made sometime during the transaction. The district court apparently chose to credit Lepore's testimony, and we have no basis for concluding that it was clearly erroneous in doing so. Accordingly, we find no error in the district court's conclusion that defendant fully intended to produce the first weekly instalment of cocaine under the agreement which Lepore described.[2]

As to defendant's ability to produce the ten additional kilograms, we find entirely plausible the district court's conclusion that defendant, having delivered eleven kilograms of cocaine one week, was capable of delivering ten kilograms

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delivered only one, commented, "It doesn't matter. I'll get you the other kilo. And if you want, even ten more I can get."), cert. denied, 112 S. Ct. 151 (1991); United States v. Foley, 906 F.2d 1261, 1264 (8th Cir. 1990) (finding that defendant had not negotiated additional sale where government agent had "simply inquired about the cost" of additional quantities of drugs).

[2] Unlike defendant, we are not troubled by the fact that the district court might have sentenced defendant on more than ten additional kilograms based on the weekly nature of the purported deal, and we express no opinion on the propriety of a hypothetical maximum base offense level quantity determination based on these facts. Rather, on the basis of the evidence before it, the district court was entitled to find, and it did in fact find, that defendant agreed to deliver only the first weekly instalment of ten kilograms.

the following week. Accordingly, we find no clear error in the district court's drug quantity calculation.

2. The Upward Departure

Finally, defendant appeals a two-level upward departure to his sentence. We review the departure along the lines set out in United States v. Rivera, 994 F.2d 942, 950-52 (1st Cir. 1993). Plenary review is applied to determine whether the allegedly special circumstances underlying the departure are of the kind that the Guidelines permit the sentencing court to consider. Id. at 951. Plenary review is also applied to interpretations of Guideline language. Id. However, we review the district court's determination that a case is unusual, and therefore worthy of departure, "with full awareness of, and respect for, the trier's superior feel for the case." Id. at 952 (citations and internal quotation marks omitted). Similarly deferential is our review of the sentencing court's findings of fact, as well as the direction and degree of the departure. Id.

In this case, the district court offered two reasons for its upward departure: 1) defendant's prominent role in cocaine dealing as evidenced both by the quantity involved and its purity; and 20 the involvement of defendant's minor children. These grounds for departure are both permissible under the Guidelines and warranted on the record before us.

a. Defendant's Prominent Role as Evidenced by Purity and Amount

Defendant argues that the sentencing court erred when, in deciding to depart upward, it relied upon the purity and amount of the cocaine involved. Consideration of both factors was allowable in this case.

Commentary Note 9 of U.S.S.G. § 2D1.1 states specifically that "[t]rafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure." Note 9 goes on to state that purity "may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution." Id. (emphasis supplied). Thus, upward departures which are based on a defendant's position in the chain of drug distribution and which are evidenced by drug purity are clearly contemplated under the sentencing guidelines. Cf. United States v. Iguaran-Palmar, 926 F.2d 7, 9 (1st Cir. 1991) (stating that "the sentencing court may consider the drug's purity in making an upward departure from the applicable guideline range") (emphasis in original).

As defendant points out, Note 9 also provides, "As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved." (emphasis supplied). We agree with the Seventh Circuit, however, that "although the note states that purity is especially relevant in the case of smaller quantities of controlled substances, it does not thereby render purity irrelevant where larger quantities are involved. Rather, the correct reading of the note is that purity is relevant without regard to the quantity of controlled substances, but is particularly relevant where the quantities involved are small." United States v. Connor, 992 F.2d 1459, 1463 (7th Cir. 1993) (emphasis supplied). In sum, the district court did not err in taking into account the purity of the drugs at issue in its decision to depart upward.

Equally futile is defendant's insistence that the sentencing court erred in considering the amount of cocaine at issue in enhancing defendant's guideline range. It is true, as defendant argues, that an upward departure based upon amount alone may unfairly duplicate a base offense level

determination. See, e.g., United States v. Fuller, 897 F.2d 1217, 1221-22 (1st Cir. 1990). Here, however, the departure was not based solely upon the amount involved. Rather defendant's role in the drug distribution chain served as the partial basis for the departure, and the amount involved, much like the purity of the cocaine, was merely indicative of defendant's role. Thus, we find no error in the court's finding that the amount and purity of the cocaine were significant indicators of defendant's prominent role in the drug distribution chain.

As to the factual findings of high purity and large amounts of cocaine, as well as the "unusualness" of these factors, see, e.g., Rivera, 994 F.2d at 952, we find no error in the district court's determination that eleven kilograms of 88% pure cocaine serves, in part, as a valid basis for departure.

b. Involvement of Children

Defendant also argues that the district court erred in basing its upward departure in part on the use of his children in the offense. Defendant essentially concedes that the involvement of children in drug trafficking activity is an accepted ground for upward departure and challenges only the existence of factual circumstances in this case that warrant a departure on that basis. He argues that the involvement of his own children is significantly less serious than the involvement of children in other cases in which departures were found warranted. See, e.g., United States v. Rodrigues-Cardona, 924 F.2d 1148, 1155 (1st Cir.) (affirming upward departure where defendant had, inter alia, "used a minor, a nine or ten year old boy, as a messenger in his drug business"), cert. denied 112 S. Ct. 54 (1991); United States v. Diaz-Villafane, 874 F.2d 43, 50 (1st Cir.) (affirming upward departure where defendant had, inter alia,

used children to deliver drugs), cert. denied, 493 U.S. 862 (1989).

In essence, we are asked to make a judgment "about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent." Rivera, 994 F.2d at 951. Given the deferential standard of review dictated for such determinations by Rivera, id. at 951-52, and given 1) the well-known relation between drugs and violence; 2) defendant's own statement that he brought his children to avoid being stopped by the police; and 3) the fact that the children were present in the apartment at the time of the drug deal, we find no error in the district court's determination that the presence of children was relevant to its decision to depart upward.

c. The Reasonableness of the Departure

As we have noted previously in examinations of the reasonableness of departures, "'the district court's leeway is substantial.'" Rodriguez-Cardona, 924 F.2d at 1156 (quoting United States v. Aguilar-Pena, 887 F.2d 347, 350 (1st Cir. 1990)). In this case, given the various factors supporting upward departure, we find no error in the district court's two-level enhancement.

III.

CONCLUSION

For the foregoing reasons, defendant's conviction and his sentence are both

Affirmed.